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Supreme Court of the United States.

October Term, 1935.

No. 715.

The Atlantic Lumber Company,

Appellant,

v.

Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

BRIEF FOR APPELLEE.

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SUBJECT INDEX.

	Page
Statement of the case	1
Facts	2
Statutes involved	4
Computation of the tax	4
Questions presented	5
Nature of the tax	6
The appellant was not engaged exclusively in interstate commerce	9
The appellant was not deprived of its property without due process of law	15
The tax does not contravene the commerce clause	18
Conclusion	20
Appendix	24

TABLE OF AUTHORITIES CITED.

Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 544, 546	22
Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 216	8, 9
Anglo-Chilean Corp. v. Alabama, 288 U.S. 218, 236	13
Atlantic Coast Line v. Daughton, 262 U.S. 413	19
Atlantic Lumber Co. v. Commissioner of Corporations and Taxation, 1935 Adv. Sh. 2053, 2054, 2055, 2059	5, 8, 9, 15, 16
Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 453, 454	8
Champlain Realty Co. v. Brattleboro, 260 U.S. 366	18
Cheney Bros. Co. v. Massachusetts, 246 U.S. 147, 155	10, 13
Crew Levick Co. v. Pennsylvania, 245 U.S. 292	15, 19
Cudahy Packing Co. v. Hinkle, 278 U.S. 460, 468	13
Cudahy Packing Co. v. Minnesota, 246 U.S. 450	15

	Page
Edelman v. Boeing Air Transport, Inc., 289 U.S. 249	15
Edwards v. Chile Copper Co., 270 U.S. 452, 455	14
Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265	18
Galveston, H. & S.A. Ry. Co. v. Texas, 210 U.S. 217	19
Hans Rees' Sons v. North Carolina, 283 U.S. 123, 135	17
Hump Hairpin Co. v. Emmerson, 258 U.S. 290	20
International Shoe Co. v. Shartel, 279 U.S. 429	20
Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 51, 53	6
Macallen Co. v. Massachusetts, 279 U.S. 620, 629	17
Matson Navigation Co. v. State Board of Equalization of California, opinion Mar. 2, 1936	18, 20
New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338	19
Oklahoma v. Wells, Fargo & Co., 223 U.S. 298	19
Old Dominion Co. v. Commonwealth, 237 Mass. 269, 277, 278	14
Old Dominion S.S. Co. v. Virginia, 198 U.S. 299	19
Ozark Pipe Line Co. v. Monier, 266 U.S. 555	9, 11
Philadelphia S.S. Co. v. Pennsylvania, 122 U.S. 326	19
Pullman Co. v. Richardson, 261 U.S. 330	20
Queens Run Refractories Co. v. Commonwealth, 270 Mass. 19	14
Shaffer v. Carter, 252 U.S. 37	19
Springdale Finishing Co. v. Commonwealth, 242 Mass. 37	14
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120, 121	18
U.S. Glue Co. v. Oak Creek, 247 U.S. 321, 324	15, 19
Virginia v. Imperial Coal Co., 293 U.S. 15	19
W. & J. Sloane Co. v. Commonwealth, 253 Mass. 529, 535	9
Western Cartridge Co. v. Emmerson, 281 U.S. 511	20

	Page
Judicial Code, §237a	1
Mass. G.L. c. 59, §5, cl. 16	22
Mass. G.L. [Ter. Ed.] c. 63, §30, cl. 4	4, 15, 21
Mass. G.L. [Ter. Ed.] c. 63, §§30, 39-43, incl.	24
Mass. G.L. [Ter. Ed.] c. 63, §39	4
Mass. St. 1909, c. 490, pt. III, §56	10
Mass. St. 1919, c. 355, §§14-22	6
U.S. Act of January 31, 1928, c. 14, §1, 45 Stat. 54, U.S.C.A. Title 28, §861a	1
U.S. Act of February 13, 1925, c. 229, §1, 43 Stat. 937	1
U.S. Constitution, art. I, §8	5

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THE ATLANTIC LUMBER COMPANY, *Appellant*,

v.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR APPELLEE.

Statement of the Case.

This case is before this court on appeal from a final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on December 3, 1935, upholding the imposition of an excise tax for the year 1932, amounting to $1508.36, upon the appellant, a corporation organized under the laws of the State of Delaware, upon the ground that this foreign corporation was doing a local business in Massachusetts.

The jurisdiction of this court is invoked under the provisions of an act approved January 31, 1928, c. 14, §1, 45 Stat. 54, U.S.C.A. Title 28, §861a, as it is claimed that this is a case where relief could be heretofore obtained by a writ of error under Judicial Code, §237a, which was approved February 13, 1925, c. 229, §1, 43 Stat. 937.

The appellant contends that it is entitled to review as the final judgment of the State court upheld the validity of the

taxing statute of that State wherein the validity of the tax was drawn in question as being contrary to the provisions of the Constitution of the United States.

Facts.

The Atlantic Lumber Company, a Delaware corporation, is engaged in the wholesale lumber business, maintaining its principal office in Boston, Massachusetts (Rec. p. 25). This office serves as a headquarters for salesmen who solicit orders in all the New England States and in part of the State of New York, and is used in carrying on correspondence and other business activities incidental to the receipt of orders and to the shipment of lumber. Orders secured by the salesmen are accepted in the Boston office. The appellant keeps no stock of lumber in Massachusetts. It fills the orders received from its customers either from some mill outside of Massachusetts or from its distributing plant in Buffalo, New York. The shipments are always made in carload lots direct to its customers from either the mill or from the Buffalo yard. Payments for sales to New England customers are made at the Boston office. The only tangible property located in Massachusetts consists of the office furniture and equipment and the automobiles used by the salesmen (Rec. p. 26).

The appellant also maintains a sales office in Buffalo, New York. It keeps its bank deposits in Buffalo, Brooklyn, New York City, Toronto, Canada, and in Boston. The latter account is the most active and is the second largest in amount. It is from this account that the Boston salesmen are paid (Rec. p. 26).

The Atlantic Lumber Company owns all the stock, with the exception of a few shares, of (*a*) the Vestal Lumber & Manufacturing Company, which is engaged in cutting timber and manufacturing lumber in Tennessee, Georgia,

Arkansas and Louisiana; (*b*) the Consolidated Lumber Company, engaged in a similar business in South Carolina; and (*c*) the Clayton Timber Company, which owns timber lands in Louisiana. None of these companies does any business in Massachusetts. The total output of these three subsidiaries is purchased by the appellant, with the exception of a small amount of lumber sold by the Vestal Lumber Company in Tennessee. Each of these companies is indebted to the appellant (Rec. pp. 26, 27).

The Atlantic Lumber Company, however, keeps its corporate books and records in the Boston office, where the office of the treasurer is located and where its directors' meetings are held, and dividends are declared and paid out of its Boston bank account. The books of the Consolidated Lumber Company and also of the Clayton Lumber Company are kept by the appellant in Boston, and so are the certificates of stock owned by the appellant in these three subsidiaries (Rec. p. 27).

The State Board of Tax Appeals found "that the business done by the appellant in Massachusetts was not exclusively interstate commerce, but that it did some local business as well" (Rec. p. 28), and, after ruling that the value of the stock of the three subsidiaries owned by the appellant should not have been included in its assets in determining the value of the corporate excess, correspondingly changed the computation made by the appellee and thereby granted a partial abatement in the amount of $1003.97, but found that the appellant was subject to an excise tax in the amount of $1508.36 (Rec. p. 28). This decision was affirmed by the Supreme Judicial Court of Massachusetts in an opinion rendered September 16, 1935 (1935 Adv. Sh. 2053) (Rec. pp. 33-38), and, in accordance therewith, a final judgment was entered on December 3, 1935 (Rec. pp. 33, 39).

Statutes Involved.

The material statutes involved are General Laws of Massachusetts, Tercentenary Edition, chapter 63, sections 30, 39 to 43, inclusive, and are printed in the Appendix, *infra*, pp. 24-31.

Computation of the Tax.

A foreign corporation is required to pay annually, on account of the carrying on or doing of business in Massachusetts, an excise tax equal to the sum of a certain percentage of the corporate excess employed by it in the Commonwealth, together with a certain percentage of the net income attributable to business done in this State. "Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of . . . five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth" and "two and one half per cent of its net income determined to be taxable in accordance with the provisions of this chapter" [G.L. (Ter. Ed.) c. 63, §39]. The corporate excess upon which the tax is based is defined as follows: "'Corporate excess employed within the commonwealth' by a foreign corporation, . . . such proportion of the fair value of its capital stock on the last day of the taxable year . . . as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date" [G.L. (Ter. Ed.) c. 63, §30, cl. 4]. The value of the intangible assets employed in Massachusetts is determined by Rule 2505 of the Rules and Regulations of the appellee, which reads as follows: "Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion

of the remainder of income allocable to Massachusetts under the provisions of section 41 of the law bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The Commissioner also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The appellee found that there was not any income derived from the business conducted by the appellant in Massachusetts, and, consequently, no part of the excise assessed was based upon such income. The tax was, therefore, based entirely upon the corporate excess.

In the course of its opinion the Supreme Judicial Court of Massachusetts stated: "No contention is made that in these particulars the statutory provisions were not followed or that the calculations were not correct" (1935 Adv. Sh. 2053, 2054) (Rec. p. 34). In other words, we do not understand that, if the appellant was liable to an excise tax, it contends that the manner or method of its calculation or the amount thereof was erroneous.

Questions Presented.

The appellant contends that it was engaged exclusively in interstate commerce, and that the tax constituted a direct burden upon interstate commerce in contravention of the commerce clause (U.S. Const. art. I, §8) and deprives it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. The appellee concedes that the ap-

pellant was engaged in interstate commerce, but claims that it also conducted a local or intrastate business warranting the exaction of an excise.

Nature of the Tax.

The original statute imposing upon foreign corporations an excise tax measured by the percentage of its corporate excess, which was such proportion of the value of its authorized capital stock as the assets employed in the business in Massachusetts bore to the total assets of the corporation, and also a percentage of its net income derived from business conducted in Massachusetts, was enacted in 1919. See St. 1919, c. 355, §§14-22. The statute in question has been construed by the Supreme Judicial Court of Massachusetts as "an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto . . . If the foreign corporation can be subjected to an excise tax in respect to its business within this Commonwealth, this appears to be a fair and practicable method of calculating the excise."

Judson Freight Forwarding Co. v. *Commonwealth,* 242 Mass. 47, 51, 53.

In upholding an excise tax imposed upon a domestic corporation engaged in the wholesale lumber business, which purchased lumber in various States and sold it in various other States, the lumber in no instance being bought and sold in the same State, the lumber company claiming that it had no stock of lumber in Massachusetts and that it was engaged exclusively in interstate commerce, the court said that the excise "is not a tax on tangible property. It is not an income tax. It is an excise tax on the 'carrying

on or doing of business' by the petitioner. . . . It is manifest that the petitioner during the year in question was 'carrying on' and 'doing business' in this Commonwealth which was not interstate in its nature. Its main office and principal place of business were here. Its 'corporate functions' were carried on here. This descriptive phrase must include as matter of fair interpretation the holding of meetings of directors and of stockholders, the declaration of dividends, the maintenance of essential corporate offices such as those of the president, treasurer and secretary, the making of corporate records, the keeping of the books of the treasurer and whatever else may be necessary for the continuance of corporate existence. The dividends were distributed in this Commonwealth. The petitioner deposited money in banks here and received interest on the same. With respect to precisely similar facts except that foreign corporations were involved instead of a domestic corporation it was said in *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147, at page 155 (affirming *Copper Range Co.* v. *Commonwealth,* and *Champion Copper Co.* v. *Commonwealth,* 218 Mass. 558, 576-579): 'The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected'; and at page 156: 'These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State.' The circumstance that those words were used touching foreign rather than domestic corporations is immaterial in its bearing on the issues here raised. Although those cases arose under an earlier tax law, the exact question involved was the same as one here presented, namely, whether the activities described constituted a doing of business within this Commonwealth not interstate in nature. Thus it is settled by authoritative adjudication that the contention of the petitioner to the effect that it is not subject to any excise

because its business is exclusively interstate in nature cannot be supported. The petitioner was doing some business in this Commonwealth which was not interstate commerce."

Carlos Ruggles Lumber Co. v. *Commonwealth,* 261 Mass. 450, 453, 454.

In the present case the Supreme Judicial Court, in its opinion, stated: "The true character of the tax thus authorized now is settled. It is confined solely to foreign corporations doing intrastate business within the Commonwealth. It does not apply to those engaged exclusively in interstate commerce. It is not a franchise tax on the right to exist as a corporation. It is not a tax on tangible or other property.

"It is not an income tax. It is measured by property and net income fairly attributable to the business done within the Commonwealth. It is an excise for the commodity or privilege of having a place for the transaction of intrastate business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto."

Atlantic Lumber Co. v. *Commissioner of Corporations and Taxation,* 1935 Adv. Sh. 2053, 2055 (Rec. pp. 34, 35).

A similar interpretation of the statute defining the nature of the tax levied thereunder was adopted by this court in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 216.

It is, therefore, apparent that the taxing statute measures the excise imposed upon foreign corporations entirely by the property and net income fairly allocable to the business done within the State.

The Appellant was Not Engaged Exclusively in Interstate Commerce.

It is now settled that an excise based upon the property and net income of a foreign corporation attributable to the business done within a State cannot be levied if the corporation does only an interstate business.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U.S. 203.
Ozark Pipe Line Co. v. *Monier,* 266 U.S. 555.

That principle has been recognized by the Massachusetts Supreme Judicial Court since the decision in the Alpha Portland Cement case, and the statute in question has ever since been held applicable only in cases where an excise was attempted to be laid on a corporation not exclusively engaged in interstate commerce.

W. & J. Sloane Co. v. *Commonwealth,* 253 Mass. 529, 535.

That the State court had the correct governing principle in mind is shown by the statement that "It [the tax] does not apply to those engaged exclusively in interstate commerce." *Atlantic Lumber Co.* v. *Commissioner of Corporations and Taxation,* 1935 Adv. Sh. 2053, 2055 (Rec. p. 34). Consequently, the State court would not have affirmed the decision of the Board of Tax Appeals unless it was found as a fact that the appellant had a local or intrastate business in Massachusetts. The nature of the appellant's business was considered from the viewpoint of interstate commerce. The exercise, however, of certain corporate functions, such as maintaining its principal office in Boston, where the treasurer was located, and where the corporate records and books were kept, and where meetings of the directors were held and dividends declared, payable

out of the Boston bank account, was held to be local or intrastate business and rightfully subjected to the excise. The decision was put squarely upon the ground that the performance of such corporate activities was not interstate commerce.

The appellee contends that the case at bar comes within the recent cases of *Copper Range Co.* and *Champion Copper Co.,* included in the case of *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147. A group of seven foreign corporations challenged the validity of an excise imposed upon them by St. 1909, c. 490, pt. III, §56, which provided for the payment by a foreign corporation of an excise of one fiftieth of one per cent of the authorized capital stock, but not in an amount exceeding two thousand dollars. The tax was upheld in every instance save that of Cheney Brothers Co. The facts in two of the cases above mentioned are, we submit, indistinguishable from the salient facts in the case at bar. As to those two cases the opinion of this court was as follows:

"Copper Range Company

> This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected.

CHAMPION COPPER COMPANY

This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State."

The appellant relies upon the case of *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555. A Missouri statute providing for a franchise tax upon the privilege of doing business was held not to apply to a Maryland corporation which owned and maintained a pipe line conducting crude petroleum from Oklahoma through Missouri to Illinois, although the company maintained its principal office in Missouri, "where it keeps its books and bank accounts and from which it pays its employees within and without the State, purchases supplies, employs labor, maintains telephone and telegraph lines, enters into contracts for transportation of crude oil, and carries on various other activities connected with and in furtherance of its pipe line operations. Along the pipe line in Missouri there are three pumping stations the sole use of which is to accelerate the passage of the oil through the line. It owns and operates

passenger and truck automobiles, but these as well as its other property in Missouri are used exclusively in the prosecution of its interstate business" (pp. 560, 561). The operation of such a pipe line was interstate commerce and beyond the taxing power of the State. It was found that all its activities within the State of Missouri were inherently connected with its interstate business, and were the means by which such business was conducted and maintained. This court held that all that was done in Missouri was in furtherance of the transportation of oil from Oklahoma through Missouri to Illinois.

The employees and the facilities of the Ozark Company were ordinarily employed in the passage of oil in the pipe line which was physically located in Missouri. Apparently everything that the company did in Missouri was inseparably connected with the transportation of crude petroleum. Furthermore, the work and supervision done by the employees was necessary and indispensable to the operation of the pipe line. That work was required to be done in the State of Missouri, where the pipe line was conducted and in operation. The nature of the business fixed the locus of the corporate activities. They could not be performed in any other State.

In the present case the appellant had no lumber yard or supplies in Massachusetts and the business of its three subsidiaries was conducted in the Southern States. It was entirely optional as to where it should locate its principal office and corporate headquarters. It apparently selected Massachusetts because it thought that location would be advantageous. A tax upon its corporate activities in Massachusetts was no more a direct burden upon its interstate commerce than was such a tax upon the Copper Range Company and the Champion Copper Company, Michigan mining companies whose principal office was maintained in Massachusetts. The imposition by Massa-

chusetts of an excise tax upon these two last-mentioned mining companies was upheld by this court in *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147, and that decision has not been overruled.

In *Cudahy Packing Co.* v. *Hinkle,* 278 U.S. 460, 468, a subsequent decision, in referring to the Ozark case, it was stated in the dissenting opinion that "That decision was made by a unanimous Court after much deliberation. It has never been disapproved." In another dissenting opinion, referring to the Ozark case, it was said: "Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation."

Anglo-Chilean Corp. v. *Alabama,* 288 U.S. 218, 236.

The appellant owns all the stock except a few shares of these three subsidiaries, the business of two of which is the cutting of timber and the manufacture of lumber in the Southern States, and of the third, simply the ownership of timber lands in Louisiana. The books of these three subsidiaries are kept in Boston. The appellant not only supervises and controls their operation, but renders financial support to all of them when funds are necessary, and all are largely indebted to the appellant. All the lumber, with the exception of a small amount which is produced by these three subsidiaries, is purchased by them from the appellant. The ownership, control and supervision of these three subsidiaries, conducting a business of the kind and character done by the appellant in Boston, could be found to be in no way connected with its interstate business. It was a local business conducted in Massachusetts by the appellant for profit. It was evidently in the interest of the appellant to finance and control these three subsidiaries in order to be assured of a supply of lumber. There was no activity whatever of this kind and character pre-

sented in the Ozark case, and, under the decisions in Massachusetts, the activity of the appellant relative to these three subsidiaries constituted the doing of business in Massachusetts.

The maintenance by a foreign corporation engaged in the mining business in Arizona of a Massachusetts office which was used by the vice-president and treasurer, from which the checks drawn on its Boston account were issued to its creditors or in payment of its dividends, and where the general books of account were kept, constituted the doing of business in Massachusetts and supported the imposition of an excise tax. "These are corporate functions which are local in their nature. They are not interstate or foreign commerce. They are activities of the corporation which have no direct relation to interstate or foreign commerce and can be conducted at the particular place selected by the corporation. They are quite independent of the character or extent of its interstate or foreign commerce and of the States or nations between which that may move and be carried on."

Old Dominion Co. v. *Commonwealth,* 237 Mass. 269, 277, 278.

Springdale Finishing Co. v. *Commonwealth,* 242 Mass. 37.

Queens Run Refractories Co. v. *Commonwealth,* 270 Mass. 19.

See *Edwards* v. *Chile Copper Co.,* 270 U.S. 452, 455.

Both the Board of Tax Appeals and the Supreme Judicial Court of Massachusetts found that the appellant was engaged in a local business in Massachusetts in addition to the interstate business conducted by it (Rec. pp. 29, 30, 35).

The Appellant was Not Deprived of its Property without Due Process of Law.

The appellant contends that certain property owned by it outside the State was taxed.

In the first place, it is important to note that no tax was imposed upon any net income of the appellant. There was none from the business conducted in Massachusetts. Even if there were such an income, a tax based thereon would not be invalid even if the income was derived entirely from interstate commerce.

> *U.S. Glue Co.* v. *Oak Creek,* 247 U.S. 321, 324.
> *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249.

In the next place, no tax was laid upon the gross receipts of the business.

> *Crew Levick Co.* v. *Pennsylvania,* 245 U.S. 292.
> *Cudahy Packing Co.* v. *Minnesota,* 246 U.S. 450.

The tax in the present case was based entirely upon that proportion of its issued capital stock that the assets employed in a local business in Massachusetts bore to the total assets of the company. In other words, the tax was measured by the corporate excess as defined in G.L. (Ter. Ed.) c. 63, §30, cl. 4. "The corporate excess employed within this Commonwealth was determined by the defendant and the excise calculated on it was paid by the taxpayer. No contention is made that in these particulars the statutory provisions were not followed or that the calculations were not correct"

> *Atlantic Lumber Co.* v. *Commissioner of Corporations and Taxation,* 1935 Adv. Sh. 2053, 2054 (Rec. p. 34).

Furthermore, the taxpayer does not point out any property outside the Commonwealth which has been taxed. The appropriate percentage of the value of the capital stock as showing what was employed in doing business in Massachusetts was used as a measure to determine the excise. No portion of the capital stock was made the subject of the tax.

"The taxpayer cannot upon this record question the allocation made by the defendant. *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156."

> *Atlantic Lumber Co.* v. *Commissioner of Corporations and Taxation*, 1935 Adv. Sh. 2053, 2059 (Rec. p. 38).

But even if it were open to the appellant to show that the percentage of its assets found to be employed in the business of the corporation within the Commonwealth was inequitable or excessive, yet there is no evidence upon the record to support such a contention. The total intangible assets of the appellant as shown by its return amounted to $1,839,221 (Rec. p. 19, Table 10C), and the allocating percentage as shown by the said return (Table 10C) was shown to be .19233%, which showed that the value of the appellant's intangible assets attributable to business conducted by it in Massachusetts amounted to $353,737 (Rec. p. 28). The tangible assets of the appellant, as shown by its return, amounted to $7682 (Rec. p. 10, Table 10C). Thus the total value of its tangible and intangible assets used in the conduct of its Massachusetts business was determined to be $361,419. The proportion that $361,419 bore to $4,187,748, which was the value of all the assets, multiplied by $3,506,626, which was the cash value of the company's capital stock, shows that the corporate excess in Massachusetts was $302,335, from which should be deducted

$964, the value of its automobiles in Massachusetts, leaving the corporate excess as $301,671, upon which the tax of $5 a thousand was imposed, or a total excise tax of $1508.36 (Rec. p. 28).

The computation of the tax as set forth in the appellant's brief, both as to net income and the determination of the corporate excess, is correct.

It may be difficult to determine with mathematical accuracy the exact portion of the company's property employed in doing business in any one State where the company conducts business in various States, yet, unless it appears that the real aim of the taxing statute is to fix an unreasonable, arbitrary figure, or that the apparent object is to reach something not taxable, then the determination of the tax should be upheld.

Hans Rees' Sons v. *North Carolina*, 283 U.S. 123, 135.

Macallen Co. v. *Massachusetts*, 279 U.S. 620, 629.

Where less than four per cent of the net profits from its sales was derived from sales made in Connecticut, in which State all the manufacturing of the company was done, a tax of forty-seven per cent of its net income was not disturbed. "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in

this record, reached, and was meant to reach, only the profits earned within the state."

Underwood Typewriter Co. v. *Chamberlain,* 254 U.S. 113, 120, 121.

A California statute laid a franchise tax at the rate of four per cent on the income derived from business done within that State by corporations doing both a local and interstate business. A steamship company made a return showing an income of $730,357.18 from its intrastate business, and one of $2,526,148.22 from its interstate and foreign business. The Tax Commissioner determined that 22.2% of its income from interstate and foreign commerce was attributable to California, and included this amount in the tax assessed against the company. This court upheld such a tax and decided that it did not burden interstate commerce and did not, by taxing property outside the State, deprive the taxpayer of property without due process of law.

Matson Navigation Co. v. *State Board of Equalization of California,* No. 346, October Term, 1935, opinion rendered March 2, 1936.

The Tax does Not Contravene the Commerce Clause.

An excise may be constitutionally laid by a State upon the intrastate business of a foreign corporation engaged within that State in both interstate and intrastate business unless, as a practical matter, the tax imposes a direct burden upon interstate commerce, or, if the burden thus imposed is indirect, but is of such a nature as to obstruct or discriminate against such commerce.

Champlain Realty Co. v. *Brattleboro,* 260 U.S. 366.

Eureka Pipe Line Co. v. *Hallanan,* 257 U.S. 265.

The intangible property of a foreign corporation engaged only in interstate commerce may be subject to a property tax on such intangibles by the State in which they are located, although it has no real or tangible personal property in that State.

Virginia v. *Imperial Coal Co.*, 293 U.S. 15.

A tax, however, laid upon the gross receipts derived from interstate commerce has been held to be a burden and contrary to the commerce clause of the Federal Constitution.

Crew Levick Co. v. *Pennsylvania*, 245 U.S. 292.
Philadelphia S.S. Co. v. *Pennsylvania*, 122 U.S. 326.
Galveston H. & S.A. Ry. Co. v. *Texas*, 210 U.S. 217.
Oklahoma v. *Wells, Fargo & Co.*, 223 U.S. 298.
New Jersey Bell Tel. Co. v. *State Board of Taxes*, 280 U.S. 338.

A tax may be laid by a State upon the property employed in conducting an interstate business or upon the net income earned by such business.

Old Dominion S.S. Co. v. *Virginia*, 198 U.S. 299.
U.S. Glue Co. v. *Oak Creek*, 247 U.S. 321.
Shaffer v. *Carter*, 252 U.S. 37.
Atlantic Coast Line v. *Daughton*, 262 U.S. 413.

The Massachusetts excise tax is imposed "with respect to the carrying on or doing of business," and can only be laid when in fact the corporation has been engaged in doing a business in this State other than interstate business during the taxable year. This tax is measured by that portion of the value of the corporate assets which (less deductions of real estate and machinery) such value of the

assets employed in Massachusetts bears to the total value of all its assets and is also measured by the net income earned within the State.

In the case at bar, there being no net income, no tax was based thereon. The tax, therefore, was laid entirely upon the portion of the company's assets found to have been used in carrying on and doing business in Massachusetts. Standards similar to those employed in the present case in computing an excise tax upon foreign corporations engaged in both a local and interstate business and proportioned to the business done and the property owned within the State have been upheld. A tax so based is not in contravention of the commerce clause even though a part of the property or capital in computing the tax is used or derived from interstate commerce.

Hump Hairpin Co. v. *Emmerson*, 258 U.S. 290.
Pullman Co. v. *Richardson*, 261 U.S. 330.
International Shoe Co. v. *Shartel*, 279 U.S. 429.
Western Cartridge Co. v. *Emmerson*, 281 U.S. 511.
Matson Navigation Co. v. *State Board of Equalization of California*, No. 346, October Term, 1935, opinion rendered March 2, 1936.

Conclusion.

The tax in question is an excise tax imposed in the absence of net income with respect to the carrying on or doing of business within the Commonwealth. It is not an occupation tax, but is based upon the privilege of doing a local business in corporate form, and concretely upon the privilege of doing such a business with a principal office in Massachusetts where all the activities of its corporate existence are performed and effective. In fact, its principal office is not only used by the appellant in the conduct of its own business, but

it is apparently the corporate headquarters of the three subsidiary companies which are owned, financed and controlled by the appellant. The tax is apportioned to the property and business done in Massachusetts, and so is not a direct burden upon interstate commerce and does not tax property beyond the jurisdiction of the taxing power. The Tax Commissioner, the Board of Tax Appeals and the Supreme Judicial Court of Massachusetts have all found that the appellant did a local business in addition to its interstate business. The Board of Tax Appeals and the Supreme Judicial Court found that the capital stock of the three subsidiaries owned by the appellant was not employed in business in Massachusetts, and corrected the computation made by the appellee by eliminating therefrom the shares of the appellant in these subsidiary companies, and consequently ordered an abatement to that extent, and also held that the rest of the computation was correct, and affirmed the tax in the amount of $1508.36, which the record shows was based entirely upon the corporate excess, which was computed and assessed according to the statute [G.L. (Ter. Ed.), c. 63, § 30, cl. 4].

The present taxing system has been in effect in Massachusetts since 1919 and has been referred to by the Supreme Judicial Court as an attempt "to adopt a general principle whereby domestic and foreign corporations shall be treated with fairness on the same footing as to taxation. . . . The general scheme of this tax law is that an excise is levied on both domestic and foreign business corporations doing business in this Commonwealth. Real estate and machinery used in manufacture by such corporations alone are subject to a local property tax in the city or town where situated. All other personal property, whether tangible or intangible, is exempt from direct or local taxation. . . . The statute is an attempt to measure the excise on foreign corporations solely by the property and net income fairly attributable to the business done within this

Commonwealth. This excise tax is in place of any other tax on personal property within the Commonwealth from which, except as to machinery used in manufacture or in supplying and distributing water, foreign corporations (and also domestic corporations) are expressly exempted by G.L. c. 59, §5, cl. 16. Comparison of the sections of the tax act relating to the taxation of domestic corporations with those relating to foreign corporations shows that the same general definitions, exemptions and principles are followed as to both, except as the inherent differences as to domicil and as to allocation of residue of net income and of corporate excess require dissimilar provisions."

Alpha Portland Cement Co. v. *Commonwealth,* 244 Mass. 530, 544, 546.

If the excess herein imposed upon the appellant is invalid, then this foreign corporation escapes all taxation in Massachusetts even on its personal tangible assets. The tax law is meant to deal on the basis of equality between foreign and domestic corporations, and a domestic corporation engaged in a local business would have to pay an excise tax. The statutory system is meant to be non-discriminatory, and the amount of the present excise laid upon the appellant is trifling as compared to its capital stock or its total corporate assets.

We therefore submit that there was no error committed by the Supreme Judicial Court in ruling that the appellant was engaged in Massachusetts in a business other than interstate, that the excise was assessed and collected upon property located within the taxing jurisdiction, that the tax imposed did not place a direct burden upon interstate commerce or place an indirect burden of such a kind or character as to obstruct or interfere with such commerce and that its corporate assets outside of Massachusetts

were merely utilized for the purpose of furnishing a measurement for the tax and not in order to assess a tax thereon, and, consequently, no property of the appellant beyond the jurisdiction of Massachusetts was reached by taxation, and the appellant was not deprived of his property without due process of law.

We further respectfully submit that no errors of law were committed by the Supreme Judicial Court of Massachusetts in affirming the order of the Board of Tax Appeals granting to the appellant an abatement in the amount of $1508.36.

Respectfully submitted,

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Appendix.

General Laws of Massachusetts, Tercentenary Edition, Chapter 63, Sections 30, 39 to 43, inclusive.

Section 30. When used in this section and sections thirty-one to fifty-two, inclusive, the following terms shall have the following meanings:

1. "Domestic business corporations", every corporation organized under or subject to chapter one hundred and fifty-six, except corporations organized under the provisions of section ten of chapter one hundred and fifty-seven, and except domestic manufacturing corporations as defined in section thirty-eight C.

2. "Foreign corporations", every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth, or is engaged here, permanently or temporarily, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind; provided, that said term shall not apply to such corporations, associations or organizations without capital stock as are subject to taxation under section eighteen of chapter one hundred and fifty-seven, or to foreign manufacturing corporations as defined in section forty-two B.

3. "Corporate excess", in the case of a domestic business corporation, except as hereinafter provided, the fair value of its capital stock on the last day of the taxable year as defined in paragraph numbered six of this section, less the value of the following on such date:

(*a*) The works, structures, real estate, motor vehicles, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the

interest of a mortgagee. The term "real estate", as used in this subdivision and in subdivision (*a*) of paragraph four of this section shall include the corporation's interest as lessee in such buildings on land held under a lease as by the terms of the lease are the property of and may be removed by the lessee, and such buildings, for the purposes of said subdivisions and of sections fifty-five and sixty-eight A, shall not be deemed real estate of the lessor.

(*b*) Securities, the income of which, if any, if received by a natural person resident in this commonwealth, would not be liable to taxation, except shares in national banks and voluntary associations, trusts and partnerships.

(*c*) Its real estate, machinery, merchandise and other tangible property situated in another state or country, except such part thereof as represents the interest of a mortgagee.

(*d*) If any portion of its cash and accounts and bills receivable, excluding notes, is attributable to an office outside the commonwealth, the same proportion of its cash and accounts and bills receivable, excluding notes, which its real estate, machinery and merchandise situated in another state or country bear to its total real estate, machinery and merchandise, to the extent that such proportion fairly represents, in the judgment of the commissioner, the amount which is properly allocable to such other state or country.

If by reason of recent organization, or otherwise, the corporation is not required to make to the commissioner a return of net income for a taxable year, the value of the corporate excess shall be determined as of the first day of April when the return called for by section thirty-five is due.

4. "Corporate excess employed within the commonwealth" by a foreign corporation, except as hereinafter provided, such proportion of the fair value of its capital

stock on the last day of the taxable year as defined in paragraph numbered six of this section, as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following on such date:

(*a*) Works, structures, real estate, motor vehicles, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(*b*) Securities held in the commonwealth, the income of which, if any, if received by a natural person resident therein, would not be liable to taxation, except shares in national banks, voluntary associations, trusts and partnerships. In determining the proportion of assets employed within the commonwealth, the commissioner may include such bank deposits in other states as are employed principally in the conduct of the business in the commonwealth.

If by reason of recent organization, or otherwise, the corporation is not required to make to the commissioner a return of net income for a taxable year, the value of the corporate excess employed in this commonwealth shall be determined as of the first day of April when the annual return called for by section forty is due.

5. "Net income", except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act applicable for the period, adding thereto any net losses, as defined in said federal revenue act, that have been deducted and all interest and dividends not so required to be returned as net income which would be taxable if received by an individual inhabitant of the commonwealth; provided that net income as defined in this paragraph shall not

include interest from bonds, notes or certificates of indebtedness of the United States or of any federal instrumentality, if such interest is by the constitution of the United States or by act of congress exempt from taxation under this chapter.

6. "Taxable year", the fiscal or calendar year for which the corporation was required to make its last return to the federal government due prior to April first of the year in which the tax is to be assessed, or, if such return was for a fractional period, a full year, including and ending with such fractional period.

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SECTION 39. Except as otherwise provided herein, every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair value of its capital stock as the assets, both real and personal, employed in any business within the commonwealth on the day fixed for determination of the value of the corporate excess employed within the commonwealth bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of its net income determined to be taxable in accordance with the provisions of this chapter.

If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the

tax shall be assessed to all said corporations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income, and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the "net income" under this chapter.

SECTION 39A. The provisions of section thirty-three imposing a minimum tax upon domestic business corporations in certain cases shall, in like cases, apply to foreign corporations with respect to the carrying on or doing of business by them in the commonwealth.

SECTION 39B. [INSERTED, 1923, 254, § 2; REPEALED, 1924, 26, § 1.]

SECTION 39C. Every foreign corporation deriving its profits principally from the ownership, sale, rental or use of real estate or tangible personal property shall pay annually, with respect to the carrying on or doing of business by it, a total excise under this chapter not less in amount than one twentieth of one per cent of said corporation's gross receipts from business assignable to this commonwealth as defined in clause six of section thirty-eight.

SECTION 40. Every foreign corporation shall make returns as provided in sections thirty-five and thirty-six; and all provisions of said sections shall apply to such corporations,

except that the term "corporate excess" in said section thirty-five shall, in the case of a foreign corporation, mean the corporate excess employed by it within the commonwealth.

SECTION 41. The commissioner shall, except as otherwise provided in section forty-two, determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:—

(*a*) Gains realized from the sale of capital assets, if such assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(*b*) Interest received from any corporation organized under the laws of the commonwealth, or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(*c*) Gains realized from the sale of capital assets other than those named in paragraph (*a*) above shall not be allocated in any part to this commonwealth.

(*d*) Interest other than that described in paragraph (*b*) above and dividends shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:—

If a foreign corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign corporation carries on any business outside this commonwealth, the remainder of the net income shall be allocated as provided in paragraphs 2 to 9, inclusive, of section thirty-eight.

SECTION 42. A foreign corporation carrying on part of its business outside the commonwealth may, by notification to the commissioner on or before the time when its return under this chapter is due to be filed, refuse to accept the allocating method set forth in the preceding section. A foreign corporation, which so refuses, and every such corporation, which is foreign to the United States and which is required to return to the federal government only income from sources within the United States, shall, on or before May tenth, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth, and such further information as the commissioner may require with reference thereto, and the commissioner shall determine the amount of the net income received from business carried on within the commonwealth. The amount thus determined, after making the deduction provided for by section forty-two A, shall be the net income taxable under this chapter and the foregoing determination shall be in lieu of the determination required by the preceding section.

SECTION 42A. The net income of a foreign corporation allocated to this commonwealth shall be its net income subject to tax under this chapter.

SECTION 42B. Every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, which has a usual place of business in the commonwealth and is engaged in manufacturing therein, shall, for the purposes of this chapter, be deemed a foreign manufacturing corporation. Every foreign

manufacturing corporation shall be taxed in the same manner and shall have the same duties under this chapter as other foreign corporations, except that from the net income of a foreign manufacturing corporation, allocated to this commonwealth, there shall be deducted the same proportion thereof which the fair cash value of machinery owned by the corporation and used in manufacturing in the commonwealth bears to the value of its total assets employed in the commonwealth, and the amount remaining shall be its net income subject to tax under this chapter. All provisions of this chapter relative to the assessment, collection, payment, abatement, verification and administration of taxes, including penalties, applicable to other foreign corporations shall, so far as pertinent, be applicable to taxes upon foreign manufacturing corporations.

SECTION 43. After determining the amount of tax due from any foreign corporation under paragraph (2) of section thirty-nine, the commissioner shall then credit the corporation with a sum equal to five per cent of the dividends paid by it, during the previous calendar year, to inhabitants of this commonwealth, and the amount then remaining due shall be the amount of tax to be levied upon the corporation under said paragraph; provided, that if more than one half of the capital stock of any such corporation is owned by another foreign corporation not subject to taxation under sections thirty to fifty-one, inclusive, but has stockholders who are inhabitants of this commonwealth and are subject to taxation upon their income under section one of chapter sixty-two, such corporation, upon filing with the commissioner such information as he shall deem necessary for the purpose, shall be credited with a sum equal to five per cent of such a proportion of its total dividends as will prevent double taxation of the income of the corporation and of the dividends of such other foreign corporation actually taxed to inhabitants of this commonwealth.